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NO. 88-777

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
Petitioner

v.

HUGHES DRILLING FLUIDS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION OF HUGHES DRILLING FLUIDS TO THE MOTION BY THE MARITIME LAW ASSOCIATION TO FILE AMICUS CURIAE BRIEF

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SUMMARY OF ARGUMENT

The motion of the Maritime Law Association of the United States (MLA) to file an amicus brief should be denied because the brief does not contribute to an understanding of the issues. The MLA incorrectly assumed the bill of lading in this case contains an arbitration clause, and urges the Court to accept writs because the failure to enforce the so-called arbitration clause may violate an international arbitration convention, the Federal Arbitration Act and district court decisions upholding arbitration clauses. The bill of lading does not require arbitration and the MLA's arguments are irrelevant.

ARGUMENT

As its first point of argument, the MLA claims the decision of the Court of Appeals for the Fifth Circuit may violate international law, referring to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter Convention). Applicant erroneously describes the appellate court's ruling as "Petitioner demanded arbitration of its general average claim but the Fifth Circuit held the bill of lading clause providing for arbitration in China was unenforceable. *Hughes Drilling Fluids v. M/V LUO FU SHAN,* 852 F.2d 840 (5th Cir. 1988)." This is a misstatement of the proceedings in the district court and in the appellate court. Petitioner did not move to stay the proceedings pending arbitration in the district court because the bill of lading does not contain an arbitration clause; the bill of lading contains a forum selection clause, which the Fifth Circuit held was unenforceable as violative of COGSA.

The MLA does not cite the bill of lading provision it claims is an arbitration clause, but Clause 2, the forum selection clause, is the only clause which refers to

arbitration.[1] Clause 2 provides in part:

> All disputes arising under or in connection with the Bill of Lading shall be determined by Chinese Law in the courts of, or by arbitration in the People's Republic of China.

On its face, this clause does not stipulate disputes shall be resolved by arbitration. Clause 2 purports to select the forum but allows dispute resolution by *either* litigation or arbitration. *In answer to a specific question from the Fifth Circuit panel, petitioner admitted at oral argument the bill of lading does not contain a binding arbitration clause.* Petitioner and respondent did not address the enforceability of an arbitration clause in a foreign forum, not because they did not think of it, but because the facts do not warrant the argument.

As applicant indicates in its brief, the Convention provides "Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration...." 21 U.S.T. 2517, 2519, T.I.A.S. No. 6997. The Federal Arbitration Act, 9 U.S.C. §2, provides "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . .shall be valid, irrevocable, and

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[1] Clause 24 provides "General average shall be adjusted in Beijing in accordance with China Counsel for the Promotion of International Trade Provisional Rules for General Average Adjustment, 1975." This clause addresses the adjustment of general average, that is, the computation of the amount each cargo interest must contribute if the vessel is seaworthy and the shipowner entitled to recover from cargo the damages to the vessel. Petitioner/shipowner has completed the adjustment according to Clause 24 and presented a demand for $452,200. The cargo owner is entitled to litigate the adjustment and its liability to pay, and Clause 24 does not restrict that right.

enforceable. . . ." Obviously, both the Convention and the Act contemplate the existence of an arbitration provision. In analyzing the applicability of the Act, this Court has written "The first task of a Court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985). As with any contract, the parties' intentions control, *id.* Both petitioner and respondent agree the bill of lading does not require the parties to arbitrate, therefore, applicant's argument that the Fifth Circuit's decision may conflict with the Convention and the Federal Arbitration Act, and with decisions of the district courts enforcing arbitration clauses is unjustified.[2]

With respect to the relevant issues, briefed by petitioner and respondent, applicant contributes two sentences. It states there is a conflict regarding the application of §1303(8) of COGSA to general average, citing *State Establishment for Agricultural Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir.), *cert denied*, 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988). *WESERMUNDE* involved a cargo damage claim subject to a binding arbitration clause in a charter party and did not mention general average, and this statement adds nothing to an understanding of the relationship between §1303(8), COGSA, and general average.

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[2] Respondent questions whether a valid agreement to arbitrate is created by a common carrier's insertion of an arbitration clause in an order bill of lading, particularly where the cargo owner is unaware of the terms of the bill of lading which he receives in the mail from a broker after the cargo is purchased, and where the bill of lading is not made subject to a charter party. Because there is no arbitration clause in the bill of lading, that issue is not before the Court.

Applicant also repeats the position of petitioner that there is confusion in the lower courts about the scope of §1303(8). As respondent previously demonstrated in its original brief in opposition to the issuance of a writ, there is no confusion among the federal courts of appeals concerning the issue in this case, that is, the invalidity of a forum selection clause in a bill of lading governed by COGSA. The Second, Fourth, Fifth and Eleventh Circuits all hold a forum selection clause in a COGSA bill of lading is unenforceable. The Ninth Circuit is the only federal court of appeals to enforce a forum selection clause in a bill of lading subject to COGSA, but only because COGSA applied by agreement and not by force of law, a distinction not present in this case or the preceding jurisprudence. The suggestion that there is confusion among the lower courts is deliberately vague and unsupportable.

CONCLUSION

Applicant asked to participate as amicus curiae, ostensibly because the "MLA can make a unique contribution on relevant issues." Applicant devotes its efforts to explaining how the Fifth Circuit's refusal to enforce "the arbitration clause" violates the Convention, the Federal Arbitration Act and district court decisions upholding arbitration clauses. Applicant has missed the issue before the Court and its "unique contribution" is confusion and distraction. Respondent urges the Court to deny the motion by the Maritime Law Association to file an amicus curiae brief.

Respectfully submitted,

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